92-1256

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
1992-93 Term

J. RAYMOND CLARK
and
ANNE LEWIS CLARK

Appellants

v.

DANIELLE CLARK
Appellee

On Writ of Certiorari To The District Of Columbia
Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

J. Raymond Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522
(912) 638-6817

Pro Se and Counsel

(A)

QUESTIONS PRESENTED FOR REVIEW

1. Did the District of Columbia courts err in asserting jurisdiction over a claim in contract by Appellant's former spouse seeking a share of monies received by Appellant from his federally approved and governed "Keogh plan", where the former neither sought nor obtained a qualified domestic relations order as defined in 29 U.S.C. 1056 of the Employees Retirement Income Security Act (ERISA)?

2. Did the courts below err in failing to give precedence to federal law over state (herein District of Columbia) law as provided in 29 U.S.C. 1144?

3. Did the said courts err further in failing to declare the said contract claim barred by the prohibition against alienation or assignment of an interest in pension benefits provided in 29 U.S.C. 1056 (d), absent a qualified domestic relations order?

4. Did the said courts err, contrary to the intent of Congress, in failing to accord immunity from legal process to alleged Keogh plan benefits as provided in the ERISA implementing regulations, 26 CFR 1.401 (a) - 13 (b) (1)?

5. Did the courts below likewise err in disregarding the distinction in ERISA, confirmed by the legislative history, and incorporated into Appellant's plan, between the withdrawal of monies from the plan upon termination of employment and the payment of benefits under the plan upon eligibility for retirement?

6. Did the courts below err in failing to recognize the legal and/or economic consequences of a deduction for alimony under the federal tax laws that was an agreed condition precedent to any payment to Appellant's former spouse?

7. Did such courts err in failing to recognize the superior entitlement of a present spouse to a vested joint interest in pension monies in the absence of a prior qualified domestic order awarding such interest to a former spouse?

8. Did the courts below deny constitutional due process of law to Appellant Anne Lewis Clark in joining her as a necessary additional party to a claim based upon a separation agreement to which she was not a party and where service of process was made by certified mail beyond the permissible limits of the federal and DC rules? 1/

9. Finally, and most significantly, does the judgment below circumvent and frustrate the intent of Congress, recognized by this Court in Guidry 2/ that pension plan participants and their families receive the full measure of pension savings, whatever the merit of competing claims, and suggest a pattern for similar nullification of public policy by other state courts in the future?

1 / Appellant Anne Lewis Clark limits her prayer for review to the issues stated in Nos. 7 and 8 above.

2/ Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990)

(C)

TABLE OF CONTENTS

	PAGE
(A) QUESTIONS PRESENTED FOR REVIEW	1,2
(B) THE PARTIES BELOW (Stated in caption)	
(C) TABLE OF CONTENTS AND TABLE OF AUTHORITIES	3-7
(D) REFERENCE TO OPINIONS BELOW	8
(E) STATEMENT OF JURISDICTION	8
(F) STATUTES AND REGULATIONS INVOLVED	9
(G) STATEMENT OF THE CASE	9
(H) STAGE AT WHICH FEDERAL QUESTIONS RAISED BELOW	13
(J) ARGUMENT	13
1. Summary of Argument	13
2. The D.C. Courts Lacked Subject Matter Jurisdiction	14
3. ERISA's Broadest Possible Preemption Clause Embraces The Involved District Of Columbia Action	17
4. Relief Here Is Barred By ERISA's "Spendthrift" Clause	19
5. ERISA Distinguishes Between Benefits Upon Retirement And Withdrawals Before Retirement Eligibility	22
6. Anne Clark Could Not Properly Be Joined, Served With Process, Or Deprived Of Her Joint Interest In The Pension Fund Conferred Upon Her By ERISA	22
7. The Appellate Court Below Misconstrued The Nature And Effect Of An Alimony Deduction Under Federal Law	24
CONCLUSION	25

(K) APPENDICES (Separate document)

I. Opinion and Judgment of the District of Columbia Court Of Appeals to be Reviewed
II. Opinions and Orders Of The Superior Court Of The District Of Columbia
III. Order Denying Rehearing
IV. Pertinent Statutes and Regulations

TABLE OF CASES AND OTHER AUTHORITIES

*Authorities chiefly relied upon are marked with an asterisk

CASES	PAGES
*Authier v. Ginsburg, 757 F.2d. 796 (6th Cir. 1985); cert. den. 474 U.S. 888 (1986)	18
In Re Cleveland Bankruptcy, 53B.R.814 (Va., 1985)	23
Cotler v. Intercounty Orthopedic Assn. Pa., 526 F.2d. 537, 530 F.2d. 536 (3rd. Cir. 1975,1976)	15
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S.ct 1029 (1975)	8
*Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990)	1, 20, 21
Hale v. Campbell, 127 F.2d 594 (CCA Iowa, 1942)	23
*Holland v. Burlington Industries, Inc., 772 F.2d. 1140 (4th Cir. 1985): affd. 477 U.S. 901 (1986)	18
*Hollenbeck v. Falstaff Brewing Co., 605 F. Supp. 421 (E.D. Mo. 1984) affd 780 F.2d.20 (8th Cir. 1985)	18
Kuchenig v. California Co., 350 F.2d.551 (CA. La., 1965); cert. den. 382 U.S. 985 (1966)	23
McGough v. First Arlington National Bank, 519 F.2d. 552 (7th Cir. 1975)	15
*Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 95 L. Ed. 2nd. 55, 107 S.Ct. 1542 (1987)	16, 20

Murphy v. Heppenstall Co., 635 F.2d. 233 (3rd. Cir., 1980); cert. den. 455 U.S. 1142 (1982) 19

Nachman Corp. v. Pension Benefits Guaranty Corp., 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d. 354 (1980) 14

New York v. Cathedral Academy, 434 U.S. 125, 54 L.Ed.2d 346, 98 S.Ct. 340 (1977) 8

Pennsylvania v. Ritchie, 480 U.S.39, 94 L. Ed.2d. 40, 107 S.Ct. 989 (1987) 8

*Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d. 39 (1987) 16

*Powell v. Chesapeake & Potomac Telephone Co. of Va., 780 F.2d.419 (4th Cir.1985); cert. den. 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d. 980 (1986) 18

R.C.Hedreen Co. v. Crow Tribal Housing Authority, 521 F. Supp. 599 (D.C. Mont. 1981) 23

*Salomon v. Transamerica Occidental Life Ins. Co., 801 F.2d659 (4th Cir. 1986) 15

Savoia Film S.A.I. v Vanguard Films 10 F.R. D. 64 (D.C. N.Y., 1950) 23

*Shaw v. Delta Airlines, Inc. 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d. 490 (1983) 17

Special Jet Services, Inc. v. Federal Ins. Co., 83 F.R.D. 591 (D.C. Pa., 1979) 23

Stevens v. Loomis, 334 F.2d. 775 (C.A. Mass., 1964) 23

Stone v. Stone, 632 F.2d. 740 (9th Cir. 1980) 19

Vink v. North America Holding Corp.,
549 F. Supp. 268 D.C.N.Y. 1982) 19

Other Authorities

*Employees Retirement Income Security Act (ERISA),
as amended, 29 United States Code 1001, et seq. passim

Internal Revenue Code,
26 United States Code 25

*Senate Report No. 98-575, Aug. 2, 1984, U.S. Code Cong. &
Admin. News, 98th Cong., 2d, Sess., Vol. 4 22

26 Code of Federal Regulations 1.401 (a) - 13 9, 20

(D)

REFERENCE TO OPINIONS BELOW

The opinions of the Superior Court of the District of Columbia and of the District of Columbia Court of Appeals in this cause below are unreported as of this time. Copies of same are included in the Appendix hereto.

(E)

STATEMENT OF JURISDICTION

(i) The Memorandum Opinion And Judgment of the District of Columbia Court of Appeals as to which review is sought herein is shown as having been filed on May 6, 1992.

(ii) The order of that court denying rehearing or rehearing en banc is shown as having been filed September 25, 1992.

(iii) N/A

(iv) Appellants believe that jurisdiction to review the above-described judgment and order is conferred upon this Court by the Supremacy Clause of the Constitution, and by 28 U.S.C. 1257 (2) and (3) in that a statute of the United States, most specifically, the Employees Retirement Income Security Act, 29 U.S.C. 1001, et seq., is here in issue. It is submitted that the above-referenced orders are a "final judgment" within the purview of the former section of Title 28, not withstanding a limited remand, in that the federal questions presented have been finally resolved. 3/

3/ Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d.328,95 S.Ct. 1029 (1975); Pennsylvania v. Ritchie, 480 U.S. 39, 94 L.Ed.2d. 40, 107 S.Ct. 989 (1987); New York v. Cathedral Academy, 434 U.S. 125, 54 L.Ed.2d. 346, 98 S. Ct. 340 (1977)

(F)

STATUTES AND REGULATIONS INVOLVED

Central to the federal questions here involved are various provisions of ERISA, most notably Sections 1132 (Civil Enforcement), 1144 (preemption of state law) and 1056 (prohibition against alienation and joint interest of present wife) of Title 29 of the United States Code. The portions of these sections believed to be most pertinent to the issues here are quoted in the Appendix. Likewise quoted there are portions of 26 C.F.R. 1.401 (a) - 13(b), (1), ERISA implementing regulations.

Also involved, albeit to a more limited degree are the due process provisions of the Constitution, pertinent in the context of Rules 4 (e) and 19 of the Rules of the Superior Court, copied from the corresponding Federal Rules, and the provisions of the Internal Revenue Code relating to the definition of deductible alimony.

(G)

STATEMENT OF THE CASE

Appellant, J. Raymond Clark (hereinafter "Ray") was formally separated from his then wife, Appellee, Danielle J. Clark (hereinafter "Danielle") upon execution of a written separation and property settlement agreement on March 1, 1976. The parties were later divorced on February 27, 1979 but, significantly, the agreement was not merged into the divorce decree. Ray was subsequently married to his present wife, Appellant, Anne Lewis Clark (hereinafter "Anne") on June 18, 1979.

In December, 1986, after he had ceased the active practice of law, closed his Washington office, moved to Georgia and terminated his Keogh plan sponsored by the American Bar Association, as the terms of that plan required upon closing of his office, Ray was served with the subject complaint of his former spouse. By that complaint, served under the "long arm" statue of the District of Columbia,

Danielle sought specific performance and damages, as further alimony, for alleged breach of Paragraph 4 of their 1976 separation agreement. The terms of that paragraph are critical to the present inquiry and it is here reproduced in its entirety for the convenience of the Court.

> It is agreed that all payments made by Husband under the so-called Keogh Plan (Qualified Retirement Plan) in the past and to be made in the future, are the joint property of the parties. At such time as the Husband elects to receive benefits under this plan, such benefits when received by Husband shall be divided equally between the parties and any such payments shall be considered to be alimony at that time. The foregoing provisions of Paragraph 4 include the shares of Putnam Growth stock purchased under the Keogh Plan which are registered in the name of wife. (emphasis supplied).

There were no other provisions in the agreement relating in any way to the pension plan and, hence, no requirement that Ray have a plan, maintain a plan, contribute to a plan or refrain from terminating that plan at any time. Ray did in fact, however, continue to make contributions to the plan until he closed his office in April, 1986. All but $25,000 of the monies later disbursed from the plan were contributed and/or accrued after the separation date and for the most part, also, after Ray's marriage to Anne.

Prior to the drafting of the agreement Ray provided a copy of the ABRA plan then in place to Danielle's counsel. The record shows that neither her counsel, who was the draftsman of the entire agreement, or either of the parties was then aware of the enactment of ERISA, effective the prior year.

After discovery and numerous related cross-pleadings, Ray, acting as his own counsel, filed a motion to dismiss the complaint for lack of subject matter jurisdiction, relying upon the closely correlated civil enforcement, anti-alienation and preemption provisions of ERISA (29 U.S.C. 1132, 1056 and 1144, respectively). The motion was

argued before D.C. Superior Court Judge Wertheim on July 11, 1988. At the conclusion of the argument, the court, albeit conceding that Ray had raised some "interesting" questions, denied the motion (App. B-9), expressing the opinion that the issues were local rather than federal in nature and properly before the Superior Court for determination under the contract laws of the District of Columbia. The parties there conceded and the court held that there was no concurrent jurisdiction in the District under the civil enforcement provisions of ERISA.

A number of motions and cross motions then ensued, including Danielle's motion to join Anne as an additional necessary party defendant under Rule 19 (similar to the corresponding rule of the FRCP). More significantly, Ray filed a motion for summary judgment relying both upon the preemption and anti-alienation provisions of ERISA and the further showing, supported by exhibits, that there was no breach under local law because, as provided in the plan - and ERISA - he was not eligible, agewise, for retirement "benefits" and had withdrawn his monies from the plan as required by its terms upon mandatory termination of the plan by abandonment of his practice. 4/ He also undertook to demonstrate that the agreed condition in Par. 4 of the agreement that any payment be deductible alimony was impossible of fulfillment under the federal tax provisions, because a lump sum judgment was sought.

Danielle filed a cross motion for summary judgment, asserting the inapplicability of ERISA's provisions to her complaint and urging entitlement to damages under D.C. contract law. 5/ All pending motions, notably including those for summary judgment, were argued before Superior Court Judge Goodrich, to whom the case had earlier been assigned, on December 5, 1990.

On December 14 of that year the court entered the order attached as Appendix II-C. In substance, Judge Goodrich found (1) that there were no material facts in dispute (p.5); that Danielle never

4/ Ray was administrator of the plan as well as a participant.

5/ Her response to the distinction made by Ray between a "withdrawal" and plan "benefits" was the argument, based upon a dictionary definition, that receiving money is always beneficial

became an assignee or beneficiary of an interest in the fund (p.5); (3) that ERISA did not apply to the case, which should be decided under local contract law (p.6); that Ray had elected to receive and did receive "benefits" under his plan (p.6); and that Danielle was entitled to judgment for one-half of the gross amount withdrawn from the fund or $139,918. Danielle's motions to join an additional party, for injunctive relief and to compel were denied as moot subject to payment of the judgment.

By subsequent orders of January 29, 1990 and April 27, 1990, the court denied Ray's motion for reconsideration, clarification and amendment of order and judgment and granted, then denied and later apparently reserved on Anne's motion for reconsideration of her joinder as an additional party.

Appellants filed a joint notice of appeal on March 1, 1990, Anne limiting her participation to the issues of joinder and invalid service. Subsequent to the filing of briefs and oral argument the District of Columbia Court of Appeals entered the Memorandum Opinion and Judgement of May 6, 1992 that is the subject of this petition for review. In that Opinion the court affirmed the orders of the Superior Court in every respect with but a single exception. Recognizing that it was the intent of the parties to the separation agreement that any payment made by Ray to Danielle be deductible under the federal tax laws as alimony, 6/ the court remanded for revision of the judgment to allow a credit for federal taxes paid on the money said to be owned to Danielle. (Appendix I, p.4)

Appellants timely filed a petition for rehearing or rehearing en banc, citing errors of law both under principles established by the D.C. courts and under federal law, specifically ERISA and the Internal Revenue Code. That petition was denied per curiam by Order of September 25,1992. (Appendix III-4). On October 2, 1992, Appellants filed a motion for stay of mandate pending application for certiorari which was denied by the D.C. Court of Appeals November 4, 1992 (Appendix III-B).

6/ No consideration was given to the fact that in many jurisdictions, including D.C. and Georgia, federal tax deductions likewise reduce gross income for state tax purposes.

(H)

STAGE AT WHICH FEDERAL QUESTIONS RAISED BELOW

Federal questions were first raised in the trial court by the Motion and Memorandum of Points and Authorities In Support of Defendant's Motion to Dismiss or, Alternatively, To Stay Action For Inconvenient Forum, dated January 14, 1987. Such questions were raised again in the Answer dated November 4, 1987, and were addressed in detail in Ray's Motion To Dismiss For Lack of Subject Matter Jurisdiction, dated April 29,1988, which was both argued and denied in a bench ruling on July 11, 1988. (See Appendices II-A and B)

Federal questions were first raised in the appellate court, by the notice of appeal filed March 1, 1990 and by the designation of issues on appeal and were argued upon brief and orally. (See Appendix I, pp. 1-2).

(I)

Not applicable

(J)

ARGUMENT

1. Summary of Argument

This Court has undertaken to review a number of ERISA - related cases in decisions that leave no doubt as to thrust, scope and intent of that very comprehensive legislation. Albeit not in the precise factual context of this proceeding, this Court has addressed in unmistakable fashion those three preeminent provisions of ERISA that were repeatedly raised below in defense of the claim, under local contract law, to a share in pension monies, i.e. civil enforcement jurisdiction (29 USC 1132), preemption of state law (29 USC 1144) and the so-called "spendthrift clause" prohibiting assignment or alienation of benefits. (29 USC 1056 (d).

The first of these provisions gives the district courts of the United States exclusive jurisdiction over any ERISA - related claim to a share of pension benefits, except an action against the plan itself. The second supersedes local law, notably including breach of contract claims, with federal statutory and / or common law, particularly where, as here, the Congress has provided an express remedy for a former spouse claimant. And the third prohibits assignment, whether voluntary or pursuant to legal process, of an interest in pension benefits, absent a qualified domestic relations order, as defined, conceded not to be present here. Further, even assuming arguendo, that Ray had in fact received "benefits", as defined, under his retirement plan, Congress has mandated, as a matter of public policy, that such benefits be protected against diversion from a plan participant and his family.

In Nachman Corp. v. Pension Benefits Guaranty Corp., 446 U.S. 359, 361, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980), this Court recognized ERISA to be "comprehensive and reticulated", with a "network" embracing every aspect of a federally-governed and protected pension plan, of which the involved plan is one, both procedural and substantive. Nachman is also of particular significance here with respect to the factual determination upon which the Superior Court judgement is predicated, i.e. the issue of "benefits" under the plan (the agreement language) verses withdrawal of monies before eligibility for retirement. Noteworthy in the context of Nachman, which involved plan termination and vesting of pension rights, is the legislative history providing for "lump sum distribution upon termination of the plan (Senate Report No. 98-575, p. 2570), which is precisely what occurred here.

2. The D.C. Courts Lacked Subject Matter Jurisdiction

The jurisdictional provisions of ERISA are set forth in 29 USC 1132 quoted in pertinent part in Appendix IV and state in substance that a participant or beneficiary may sue in state court under subsection (a) (1) (B) under concurrent jurisdiction only to recover benefits due him under the terms of his plan or to enforce or clarify his rights under his plan. The action here was not brought against the plan nor did Danielle claim entitlement to a share of benefits under the terms

of the plan; she relied solely upon paragraph 4 of the separation agreement set forth at page 10, supra. With this single exception noted the statute confers exclusive jurisdiction upon the federal district courts over pension plan claims, including an action under (B) "to obtain other appropriate relief". There was good cause for this strict limitation of jurisdiction by the Congress, since no court, except a federal court, can be relied upon to apply governing federal legal standards. Cotler v. Intercounty Orthopaedic Assn. Pa., 526 F.2d 537, 530 F.2d 536 (3rd Cir. 1975, 1976). Even more forceful is the criticism by the 7th Circuit of a district court ruling because it "relegated" defendant "to a sterile state court" for vindication of his federal remedies. McGough v. First Arlington National Bank, 519 F.2d 552 (1975).

The rulings of the courts below with respect to jurisdiction are inconsistent and, in large measure, inexplicable. Superior Court Judge Wertheim, as noted found no concurrent jurisdiction although he recognized Danielle to be beneficiary. 7/ Holding that jurisdiction was either exclusively federal or exclusively local, he opted for the latter conclusion. But, subsequently, Judge Goodrich, in his order of December 14, 1990 found that Danielle was neither a beneficiary nor an assignee of the pension plan in rejecting both federal jurisdiction and the mandates of ERISA. (II-C) The appellate court's holding that Danielle had acquired a joint interest in the pension fund, apparently the basis for affirmance of the lower court's view of the case, cannot be reconciled with the latter's finding that she never became an assignee-which certainly squares with 29 USC 1056 (d)-and, hence, could not have acquired any interest in the monies in the plan.

It is indisputable here that both the complaint, by seeking a share of alleged retirement "benefits", and most certainly, the defense, raised significant ERISA issues. The judgment rendered by the trial court is expressed in terms of a one-half share of such benefits. This Court has repeatedly recognized the paramount su-

7. Salomon v. Transamerica Occidental Life Ins. Co., 801 F.2d 659 (4th Cir. 1986) held that the fiancee of a deceased employee who claimed the latter's benefits under state breach of contract law, was an ERISA "beneficiary, entitled to bring the claim, as to which, the court further ruled, state law was preempted.

premacy of the federal courts where ERISA questions have been presented, whether by complaint or by way of defense. Noteworthy in this regard are the twin decisions in Taylor and Pilot Life. 8/

In Pilot Life, decided the same day as Taylor, the state law claim was for "tortious breach of contract". The Court held that unless state common law causes of action fall under an exception to §514 (a) of ERISA, they are expressly preempted; that ERISA's civil enforcement provisions provide the exclusive vehicle for ERISA participants or beneficiaries, with the federal remedy displacing state causes of action. (95 LEd. 2d at 48, 54). The court added: "The civil enforcement scheme of §502 (a) is one of the essential tools for accomplishing the stated purposes of ERISA". (95 LEd. 2d at 51)

Notwithstanding the fact that the claim did not call for enforcement of ERISA, the defense does and that is sufficient to invoke federal jurisdiction and federal law. This is made abundantly clear in Taylor, as well as other decisions. In Taylor, this Court, in a unanimous decision by O'Connor, J., recognized that the complaint purported to raise only state law causes of action, but held that it was necessarily federal in character, raised federal issues of law and arose under the laws of the United States, and, because Congress has manifested the intent that once preempted by ERISA and displaced by the civil enforcement provisions of that Act, it was, hence, removable. Pointing out that the "Touchstone" is not the obviousness of the preemption defense, but rather the intent of Congress, the Taylor court said:

> Indeed, as we have noted, even an 'obvious' preemption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of §502 (a) removable to federal court. (95 L.Ed.2d. at 65).

The instant proceeding fully confirms the wisdom of the Congress in insulating Keogh and other pension plans from the

8. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed. 2d 55 (1987), Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 980, 95 L.Ed. 2d 39 (1987).

ravages of state domestic relations courts, except as the limited powers of such courts are expressly delineated in ERISA. (e.g., the "qualified domestic relations order")

3. ERISA's Broadest Possible Preemption Clause Embraces The Involved District of Columbia Action

Even if it be assumed, arguendo, that the District of Columbia Courts properly acquired jurisdiction over the cause, the judgment is no less improper. They erred in deciding the merits of the claim under local contract law rather than federal law. 29 USC 1144 makes it abundantly clear that state law is superseded by federal law "insofar as they [state laws] may now or hereafter relate to any employee benefit plan", again with the special exception carved out in subsection (b) (7) of that provision for a qualified domestic relations order. Here, as earlier shown the only subject of the complaint was the Keogh plan in which Ray was a participant as well as the Employer.

The latter, in early presenting his motion to dismiss in the Superior Court relied in substantial measure upon the decision of this Court in Shaw v. Delta Airlines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 2d. 490 (1983).

The Court's decision there of ERISA's preemption clause is a worthy of quotation at some length:

> In fact, however, Congress used the words relate to in §514 (a) in their broadest sense. To interpret §514 (a) to preempt only state laws designed to affect employee benefit plans would be to ignore the remainder of §514. It would have been unnecessary to exempt generally applicable state criminal statutes from preemption in §514 (b), for example, if §514 (a) applied only to state laws dealing specifically with ERISA plans.
>
> Nor, given the legislative history, can §514 (a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA-reporting, disclosure, fiduciary responsibility, and the like. The bill

> that became ERISA originally contained a limited preemption clause, applicable only to state laws relating to the subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language . . . Statements by the bill's sponsors during the subsequent debate stressed the breadth of the federal preemption, (463 U.S. at 98).

In sum, this Court interpreted the preemption clause as embracing the application of state law to actions in any way connected with a plan, even though the plan itself was not involved, just as the jurisdictional provisions of ERISA clearly transcend actions against the plan itself.

The Shaw interpretation of ERISA's preemption clause was not lost upon the lower federal courts. Noteworthy among the cases implementing Shaw's ruling as to the scope of ERISA's preemption mandate are the decisions of the Fourth Circuit in Holland v. Burlington Industries, Inc., 772 F. 2d 1140(1985) and Powell v. Chesapeake & Potomac Telephone Co. of Va., 780 F. 2d 419 (1985); cert den. 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986). The crucial inquiry is not the purpose of the action but its relationship to an ERISA pension plan, Authier v. Ginsburg, 757 F.2d. 796 (6th Cir., 1985). cert den. 474 U.S. 888 (1986). Succinctly stated, state common law is preempted if the dispute has its "genesis" in an employee benefit plan. Hollenbeck v. Falstaff Brewing Co., 605 F. Supp. 421 (E.D. Mo. 1984); aff'd 780 F.2d 20 (8th Cir.1985).

Clearly, the claim here relates to nothing other than such a plan and it necessarily follows that the D.C. contract law principles upon which the lower courts here relied, even had they been correctly applied, 9/ were supplanted by federal law, in view of the broad

9. In point of fact, of course, the D.C. Court of appeals failed here to recognize it own oft-stated principles of law in several major respects. To illustrate, it affirmed a summary judgement where the critical material fact relied upon by the trial court, the alleged receipt of "benefits under this plan", had been disputed with compelling extrinsic evidence. Further, it undertook to rewrite an unmerged separation agreement containing a deductible alimony condition precedent by remanding for a tax credit which is neither legally nor economically the equivalent.

scope of ERISA's preemption clause.

No less persuasive of the error of the District of Columbia courts in ignoring federal law is the holding in Murphy v. Happenstall Co., 635 F. 2d 233 (3rd. Cir., 1980). The court there stated in pertinent part:

> Moreover, except for explicitly exempted plans, ERISA wholly regulates and federalizes the pension field. Section 1144 preempts any state law relating to ERISA-covered pension plans. Furthermore, like the Taft-Hartley Act grant of jurisdiction over labor-management contracts, ERISA, in Section 1132 (a) and (e), confers jurisdiction over actions concerning rights and benefits under a pension plan. In enacting ERISA, Congress authorized the evolution of a federal common law of pension plans. (635 F. 2d at 237)

4. Relief Here Is Barred By ERISA's "Spendthrift" Clause

In addition to protecting against state court frustration of ERISA's public policy by providing for federal court jurisdiction and superseding federal law, the Congress, by the so-call "spendthrift" provisions of 29 U.S.C. 1056 (d) (Appendix IV) has also precluded improvident action by the plan participant himself, akin to common law voidability of contracts by minors. As this section was first enacted in 1974, the prohibition against assignment or alienation of plan benefits was absolute and without exception. Notwithstanding, some state domestic relations courts, notably in community property states, held that provision to be inapplicable to spouse or children. (e.g., Stone v. Stone, 632 F. 2d. 740 (9th Cir. 1980)

Cognizant of this situation, the Congress undertook to both clarify and modify the anti-alienation provision in the Retirement Equity Act of 1984. The two major changes wrought by the 1984 ERISA amendments that are pertinent here are (1) the creation of a joint interest in pension monies in a plan participant's spouse, Anne in this instance, that can only be divested by (2) the "special remedy" of the qualified domestic relations order. In the latter regard, the Congress said:

> Reasons for change
> The Committee believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension plan to be divided under certain circumstances. In order to provide rational rules for plan administrators the committee believes that conforming changes to the ERISA preemption provision are necessary to insure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA. (Senate Report No. 98-575, (emphasis supplied).

Here Danielle seeks precisely what the Congress was there referring to, a division of "benefits under a pension plan", as to which the only order that the District of Columbia might have entered pursuant to a claim under local law, but a remedy that was never invoked, was the qualified domestic relations order as defined in the Act.

Commenting upon the legislative delineation of available remedies, this Court said in Taylor, supra:

> As we have made clear today in Pilot Life "the policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undetermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." (95 L. Ed. 2d at 63-64)

Clearly, Congress rejected all state law remedies for a former spouse seeking a share of pension benefits other than the qualified domestic relations order.

This Court recently had occasion to review the ERISA spendthrift clause in great depth in Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990)

In that case, Guidry, a former officer, pleaded guilty to

embezzling funds from his union. He agreed to entry of a judgment against him in the latter's favor. When he applied for his benefits from the union's separate pension fund, the Court of Appeals imposed a constructive trust upon those funds to satisfy the judgement. This Court reversed and remanded, referring to the anti-alienation clause of ERISA and the implementing regulations at 26 CFR 1.401 (a)-13(b) (1), summarized in footnote 10 of the decision. In sum, this Court held that the public policy mandate of ERISA is so clear that even a convicted felon cannot be deprived of his benefits by the victim of his wrongdoing. To the same effect see the earlier decision in Vink v. SHV North America Holding Corp., 549 F.Supp. 268 (S.D.N.Y. 1982). This Court summarized its rationale in Guidry as follows:

> Nor do we think it appropriate to approve any generalized equitable exception-either for employee malfeasance or for criminal misconduct-to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206 (d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless) even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for the Congress to undertake that task. (493 U.S. at 376).

In accompanying footnote 18, the Court pointed out that the Congress had, indeed provided an exception for a qualified domestic relations order, to which reference has earlier been made.

There was some suggestion in the several court proceedings here that pension benefits lost their legislative protection once they were received. This argument would attribute to Congress an exercise in futility if pension savings were only to be safeguarded before pensioners actually needed "the stream of income" in their retirement years. In point of fact, of course, the CFR section referenced by the Court in Footnote 10 refers to "benefits provided", i.e., in the past, as do the other federally protected retirement benefits cited by the Court in Footnote 13 of Guidry. In short, even if the

orders of the courts below were otherwise proper, the legal process of the District does not extend to what those courts have characterized as pension "benefits".

5. ERISA Distinguishes Between Benefits Upon Retirement And Withdrawals Before Retirement Eligibility.

The principal factual issue before the trial court was whether Ray had elected to receive and had in fact received "benefits under this plan", the condition precedent to any liability under Paragraph 4 of the separation agreement. He introduced a number of exhibits to establish pre-retirement age withdrawal upon the closing of his office pursuant to the provisions of his plan, including the disbursement notice from the plan trustees. Notwithstanding, Judge Goodrich found that Ray had elected to receive and had received "benefit [s]" although there was but one lump sum payment, and granted summary judgment for Danielle on the basis of this finding. (Appendix II-A).

ERISA, its legislative history and the plan - which must conform to ERISA to receive IRS approval - provides for the withdrawal of plan monies by any participant upon termination of employment or of the plan itself. In this instance the plan terminated by its own terms when Ray closed his office. Since he was then age 64 he was not eligible for retirement benefits as his plan did not vary from the ERISA age 65 retirement eligibility provision. (29 U.S.C.1055). The courts below rejected any reliance upon ERISA, however. Indeed, notwithstanding the reference in the agreement to "benefits under this plan", there is no indication they ever looked at the plan.

The distinction urged by Ray below was the subject of comment in the legislative history of ERISA, which, as earlier noted, recites provision in the act for "lump sum distribution upon termination of the plan". (Senate Report No. 98 - 575, Aug. 2, 1984, U.S. Code Cong. & Admin. News, 98th Cong., 2d. Sess. Vol 4, p. 2570).

6. Anne Clark Could Not Properly Be Joined, Served With Process Or Deprived Of Her Joint Interest In The Pension Fund Conferred Upon Her By ERISA.

The rulings below with respect to Anne, who married Ray in 1979, to the extent they can be fathomed, do violence to established principles of constitutional due process of law. Further, of course, they completely ignore the "Reasons For Change", previously quoted (supra, p. 18) that gave rise to the 1984 ERISA amendments.

Anne obviously was not a party to the 1976 separation agreement between Ray and his former spouse and no basis for any cause of action against her has ever been suggested either by Appellee or the D.C. courts. The fact that a judgment against Ray may affect Anne is not a basis for joinder. It is the nature of the claim, here alleged breach of contract by Ray, that is determinative of joinder. Stevens v. Loomis, 334 F.2d. 775 (CA Mass. 1964) ; Kuchenig v. California Co., 350 F.2d. 551 (CA La. 1965) ; cert. den. 86 S.Ct. 561,382 U.S. 985, 15 L.Ed.2d. 473 (19). Non-parties to the contract in issue are not indispensable parties. Special Jet Services, Inc. v. Federal Ins. Co., 83 F.R.D. 591 (D.C. Pa. 1979 ; Savoia Film S.A.I. v. Vanguard Films, 10 F.R.D. 64 (D.C. N.Y. 1950); R.C. Hedreen Co. v. Crow Tribal Housing Authority, 521 F.Supp. 559 (D.C. Mont. 1981). To the same effect, neither the donee under a contested will nor the non-debtor wife of a debtor in bankruptcy is an indispensable party. Hale v. Campbell, 127 F.2d.594 (CCA Iowa, 1942) ; In re Cleveland Bankruptcy, 53 B.R. 814 (Va. 1085).

Furthermore, even if Anne could conceivably have been deemed a necessary party at a time when the case had already been disposed of by a grant of summary judgment against Ray, she was not properly served. Rules 19 and 4 (e) of the Superior Court rules track from the corresponding rules of the F.R.C.P. Service upon her by certified mail in Georgia does not satisfy the so - called "bulge" provision of the latter rule, incorporated into Rule 19. Due process of law has been cavalierly disregarded by the D.C. courts in this regard.

Moreover, Anne's vested rights under ERISA have likewise been totally ignored. The courts below never addressed the question of whose one-half interest in the pension fund they were undertaking to award to Danielle. Certainly, Ray, as the participant, was

entitled to at least a joint interest in the plan under ERISA, which the agreement here sought to be enforced concedes. But Anne, as Ray's spouse was given a joint interest in his pension plan by the 1984 amendments previously discussed. That interest could only be divested by a qualified domestic relations order (29 U.S.C. 1056 U).
There having been no such order Anne's interest was fully vested when the monies were withdrawn with her written consent. Significantly, at no time did Danielle ever claim a joint interest in the plan superior to that granted Anne, as the spouse of the plan participant by the Congress.

7. The Appellate Court Below Misconstrued The Nature And Effect Of An Alimony Deduction Under Federal Law.

Even the very limited remand distorts acknowledged Federal Law which is very clear as to what constitutes "alimony" under the Internal Revenue Code. The rationale and substance of the remand by the D.C. Court of Appeals is as follows:

> It appears that under the agreement, the parties intended that any such benefits received by the husband and divisible equally between them would be 'considered to be alimony' and hence payment to the wife would be in such fashion that he could claim a tax deduction (and she pay the income tax) on her share..... Appellant asserts that this is impossible under Internal Revenue Service Regulations concerning 'lump sum' alimony payments... In her brief on appeal appellee did not dispute either point. Thus, it appears that to effectuate the parties' understanding in the agreement, appellant is entitled to a credit against the approximately $139,819.00 owed appellee for the amount of federal income tax he paid on that amount. The parties should compute this figure and present it to the trial court as a revision of the judgment. (App. I , pp. 3 -4).

The appellate court has thus recognized that Ray raised an important issue under the Internal Revenue Code; however, the attempted resolution of this issue is not consistent with the agreement by the lower court. There is a vast difference, both legally and economically, between an alimony deduction and the federal tax

"credit" referred to an inexpert non-federal domestic relations court for determination.

Moreover, the alimony deduction was an integral part of the agreement that Danielle asked be specifically performed, indeed, a condition precedent to "any" payment. Impossibility has always been recognized as a valid defense. If, as these petitioners contend, and appellee apparently concedes it is impossible under federal law for Ray to claim an alimony deduction for a lump sum property settlement payment to Danielle, the agreement cannot be enforced in any part. 10 /

CONCLUSION

The record in this case is replete with federal questions, timely raised and fully argued below, which were either incorrectly answered by the lower courts, or, for the most part simply brushed aside. The award of a judgment to a former spouse for a share of pension plan "benefits" by the District of Columbia courts, other than by a "qualified domestic relations order", violates both the letter of ERISA and its implementing regulations, and the public policy declared by the Congress and recognized by this Court.

Review upon writ of certiorari is prayed.

10/ See Note 39 to 26 USC 215 (a)

Respectfully submitted,

J. Raymond Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522
(912) 638-6817

Pro Se and Counsel

92-1256

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

J. RAYMOND CLARK
and
ANNE LEWIS CLARK

Petitioners

v.

DANIELLE J. CLARK
Respondent

On Writ of Certiorari To The District Of Columbia
Court Of Appeals

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

J. Raymond Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522
(912) 638-6817

Pro Se and Counsel

Appendix I

DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 90-FM-226

RAYMOND J. CLARK, *et al.*, APPELLANTS,

v. D-2976-86

DANIEL J. CLARK, APPELLEE

Appeal from the Superior Court of the
District of Columbia
Family Division

(Hon. George H. Goodrich, Trial Judge)
(Argued March 31, 1992 Decided May 6, 1992)
Before STEADMAN, SCWELB and FARRELL, *Associate Judges.*

MEMORANDUM OPINION AND JUDGMENT

Appellee, the former wife of appellant, brought suit in Superior Court for specific performance of a provision of a 1976 separation agreement purporting to entitle her to one half of past and future payments by appellant into a Keogh (or Qualified Retirement) Plan. Appellant defended against the suit partly on the ground that enforcement of the provision would contravene the anti-alienation provision of the Employees' Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* (1974). While the present suit was pending, appellant filed suit in the United States District Court for the District of Columbia seeking to enjoin the Superior Court from further action on the ground that the District Court had exclusive jurisdiction of the matter under ERISA. The District Court dismissed the suit, *Clark v. Superior Court of the District of Columbia*, 702 F. Supp. 4 (D.D.C. 1988), and on appeal the United States Court of Appeals for the District of Columbia Circuit affirmed summarily. *Clark v. Superior Court of the District of Columbia*, 284 U.S. App. D.C. 284, 905 F.2d 389 (1990). The court held that ERISA "is inapplicable to the instant case because the funds at issue [having been received by the husband in a lump sum] do not constitute benefits under the protection

of an ERISA Plan." Id.[1] In the meantime, the Superior Court in the present action had granted summary Judgment for appellee. The court too found "that ERISA does not apply and that this case should be decided by applying the principles of contract law in this jurisdiction." Applying those principles, the court concluded that under the terms of the contractual provision in dispute, appellee was entitled to one half of the retirement funds appellant had paid into the Keogh Plan but then withdrawn in a single sum.

We hold first that the decision of the United States Court of Appeals, establishing that ERISA does not apply to the funds claimed by appellee under the separation agreement, is determinative of appellant's ERISA defense to the present lawsuit. *See, e.g., Goldkind v. Snider Bros., 467 A.2d 468, 473-74 (D.C. 1983).*[2]

We also uphold Judge Goodrich's determination -- applying District of Columbia contract law -- that upon receipt by appellant of the $279,637.56 from the Keogh Plan, "one-half of this sum became due and owing to plaintiff pursuant to their Agreement." We agree with Judge Goodrich that the provision of the agreement which the parties dispute (paragraph 4) is unambiguous.[3] It provides "that all payments made by Husband under the so-called Keogh Plan (Qualified Retirement Plan) *in*

---

[1] The appellate court specifically held that the anti- alienation provision of ERISA, which is at the heart of appellant's argument on this point, is "inapplicable to this case." The district court had likewise ruled that Mrs. Clark's suit in Superior Court "is clearly not related to enforcement of ERISA or of the terms of Raymond Clark's [Keogh] plan," 702 F. Supp. at 8, noting that "[b]ecause he has received his benefits in a lump sum, he no longer 'is or may become entitled to a benefit."' Id. at 8 n.7 (citations omitted).

[2] The fact that Mrs. Clark was not a party to appellant's suit in federal court does not mean the outcome of that suit may not bind appellant. Parklane Hosiery v. Shore, 439 U.S. 322 (1979).

[3] When a document "is facially unambiguous its language should be relied upon as providing the best objective manifestation of the parties' intent." *1010 Potomac Assocs. v. Grocery Mfrs. of America, Inc.*, 485 A.2d 199, 205 (D.C. 1984).' The only portion of the agreement cited by either party as bearing on the disputed issue is paragraph 4. "[W]e treat the question of contractual interpretation, beginning with the question of ambiguity, as one of law, and, hence, we make our own *de novo* determination of the correctness of the trial court's ruling." *Cbristacos v. Blackie's House of Beef*, 583 A.2d 191, 194-95 n.3 (D.C. 1990) (citations and internal quotation marks omitted).

the past and to be made in the future, are the *joint property* of the parties" (emphases added). It further provides that, "[a]t such time as the Husband elects to receive benefits under this plan, such benefits when received by Husband shall be divided equally between the parties and any such payments shall be considered to be alimony at that time.[4] Appellant's argument that Mrs. Clark was entitled to share in these "benefits" only if he eventually received them as periodic payments "under [the] plan" rather than as a lump sum upon termination of his business is refuted by the plain language of the agreement, which makes all past and future payments into the plan "the joint property of the parties." It would rob this language of all meaning if Mr. Clark could convert "joint property" into his sole property by the simple expedient of withdrawing all benefits from the plan in a single lump sum. Nor did appellant bring to Judge Goodrich's attention any evidence sufficient to create a triable issue of fact on whether the parties intended to vest in him such control -- simply by the manner of obtaining the funds -- over whether his wife could ever receive her one-half share of the "joint property."[5] We sustain the trial court's reading of the agreement.

We do think, however, that this case must be remanded

---

[4] When interpretation of this same separation agreement was before us previously, *Clark v. Clark*, 535 A.2d 872 (D.C. 1987), (*Clark* I), we sustained the trial court's finding that the parties intended Mr. Clark's alimony obligation to cease upon his retirement from his law practice. In support of this finding the trial judge had noted, *inter alia*, "the provision elsewhere in the Agreement for Mrs. Clark~s financial security, . . . [namely,] the provision of paragraph 4 requiring Mr. Clark to divide his Keogh Plan benefits . . . equally with Mrs. Clark . . . ." *Id.* at 878-79.

[5] The plan-related documents appellant cites to support the parties' intent to distinguish between "benefits" and 'withdrawals" have not been furnished to us on appeal. In any event, appellant's references to them in the pleadings below demonstrate clearly that they are all dated between 1984 and 1986, at least eight years after the agreement was executed.

Moreover, the fact that paragraph 4 of the agreement left appellant apparent discretion whether to make future payments into the Keogh Plan (but see *Clark* I, *supra*, sustaining trial court's finding that wife's share in retirement payments was partial *quid pro quo* for termination of husband's alimony obligation upon retirement) does not affect our analysis given that appellant had already made payments into the plan by the time the agreement was reached and continued to do so thereafter.

for further trial court consideration of one aspect of the agreement. It appears that, under the agreement, the parties intended that any such benefits received by the husband and divisible equally between them would be "considered to be alimony" and hence that payment to the wife would be in such a fashion that he could claim a tax deduction (and she pay the income tax) on her share.[6] Judge Goodrich did not appear to dispute this understanding of the parties, stating that "[i]f defendant is concerned about labeling this amount as alimony for tax purposes, he may do so and claim his deduction with plaintiff reporting this amount as income." Appellant asserts that this is impossible under Internal Revenue Service Regulations concerning "lump sum" alimony payments, and that he has long since paid the federal income tax on the full $279,637.56. In her brief on appeal, appellee did not dispute either point. Thus, it appears that to effectuate the parties' understanding in the agreement, appellant is entitled to a credit against the approximately $139,819.00 owed appellee for the amount of federal income tax he paid on that amount. The parties should compute this figure and present it to the trial court for consideration as a revision of the judgment. Finally, there is ample basis in the record supporting both the order adjudging appellant in contempt and the decision to make appellant's present spouse a party to the action, Super. Ct. Civ. R. 19 (a) (1).

Accordingly, the case is remanded for the further proceedings required by this opinion. In all other respects the judgment of the Superior Court is affirmed.

So ordered.
FOR THE COURT:

JOY A. CHAPPER
Acting Clerk

---

[6] Appellant proffered the deposition testimony of the drafting attorney to this effect.

Copies to:
Hon. George H. Goodrich
Clerk, Superior Court

J. Raymond Clark, pro se
157 St. Andrews Drive
Saint Simons Island, GA 31522

Brian D. West, Esq.
8000 Towers Crescent Drive, #660
Vienna, VA 22182

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION

DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK
Plaintiff

v.

J. RAYMOND CLARK

Defendant

ORDER

Upon consideration of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction;

Upon consideration of the Opposition thereto;

Upon consideration of argument by counsel; it is by this court

ORDERED that the Defendant's Motion to Dismiss be, and it hereby is denied, and that the Plaintiff be, and she hereby is awarded _____ dollars representing her attorney's fees and costs expended in defending this motion.

Judge

cc: Sandground Smolen Barondess
West & Plevy, P.C.
8000 Towers Crescent Drive
Suite 660
Vienna, VA 22180

Raymond Clark
157 St. Andrews Drive
St. Simons Island, Georgia31522

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK
1564 33rd Street, N.W.
Washington, D.C
Plaintiff

v. CIVIL ACTION NO. D2976-86

J. RAYMOND CLARK
157 St Andrews Drive
St. Simons Island, Georgia 31522
Defendant

ORDER

UPON CONSIDERATION of the Defendant's Motion for Reconsideration and Amendment of Order of Court; upon consideration of the Opposition thereto; it is by this Court

ORDERED that the Defendant's Motion be, and it hereby is, denied.

JUDGE
ENTRY DATE:

cc:
Sandground Smolen Barondess
West & Plevy, P.C.
Bar Assoc. No. 407844
1333 H Street, N.W., Suite 600
Washington, D.C. 20005
Counsel for Plaintiff
(703) 761-4200

J. Raymond Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522

Appendix II-C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION
DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK,
Plaintiff

v. Case No. D 2976-86

J. RAYMOND CLARK,
Defendant

ORDER

This matter comes before the Court by virtue of the Plaintiff's Motion for Leave to Join an Additional Necessary Party filed on January 19, 1988 and the Defendant's Opposition thereto filed on February 19, 1988; the Plaintiff's Motion for Temporary Restraining Order, Preliminary Injunction and Other and [sic] Further Judicial Relief filed on February 3, 1988 and the Defendant's Opposition thereto filed on February 29, 1988; the Plaintiff"s Motion to Compel filed on February 3, 1988 and the Defendant's Opposition thereto filed on April 12, 1988; the Defendant's Motion for Summary Judgment filed on February 10, 1988 and the Plaintiff"s Opposition to Defendant's Motion for Summary Judgment and Plaintiff"s Cross-Motion for Summary Judgment filed on April 13, 1988; and a hearing held regarding these matters on December 5, 1989 at which the motions were taken under advisement. The Court now makes the following:

I. FINDINGS OF FACT

Plaintiff Danielle J. Clark and defendant J. Raymond Clark were divorced by this Court on February 27, 1979. Prior to their divorce, the parties executed a written Separation and Property Settlement Agreement [hereinafter "Agreement"] on March 1, 1976. In a ruling on a previous unrelated dispute regarding paragraph 8 of the Agreement, the Court of Appeals explained that

> The Agreement was drafted by an attorney retained by Mrs. Clark following negotiations at which Mr. Clark, an attorney, represented himself.

> It purported to resolve all of the property issues involving the parties. It was neither ratified, approved by the Court, nor merged into the divorce decree as the Agreement required.

Clark v. Clark, 535 A 2d 872, 874 (D.C. 1987).

The provision of the Agreement now in dispute is paragraph 4 which reads as follows:

> 4. It is agreed that all payments made by Husband under the so-called Keogh Plan (Qualified Retirement Plan) in the past and to be made in the future, are the joint property of the Parties. At such time as Husband elects to receive benefits under this plan, such benefits when received by Husband shall be divided equally between the Parties and any such payments made to Wife shall be considered to be alimony at that time. The foregoing provisions of this Paragraph 4 include the shares of Putnam Growth Stock purchased under the Keogh Plan which are registered in the name of Wife.

Plaintiff's Complaint Exhibit A p. 6. The Keogh account was completely paid out in November 1986 and the defendant received the lump-sum amount of $279,637.56 at that time.

Plaintiff seeks specific performance and enforcement of the separation agreement as well as damages. Defendant moved to dismiss this action on the grounds that the Employees Retirement Income Security Act of 1974 [hereinafter "ERISA"] broadly preempts state law vesting exclusive jurisdiction in the District Court. At a hearing on July 11, 1988, Judge Wertheim denied defendant's Motion to Dismiss stating that

> this is basically a contract action in which the measure of damages, if any, will be by reference to sums that were withdrawn from a Keogh Plan, or received from a Keogh Plan. But, the obligation that's sought to be enforced does not arise out of any such plan, doesn't depend upon the terms of any such plan, doesn't require interpretation of any such plan. And, nor does anyone on behalf of the plan, even if you knew who that was, have to take any action as a result of whatever may be wrapped in this case.

Transcript at 36-37. On August 30, 1988, Judge Wertheim affirmed his ruling by denying the defendant's Motion for

Reconsideration and Amendment of Order of Court.

Defendant subsequently filed an action in the U.S. District Court for the District of Columbia, asking the District Court "to enjoin the Superior Court from continuing to act on this matter, on the grounds that the District Court has exclusive jurisdiction, pursuant to the provisions of the Employees Retirement Income Security Act of 1974 (as amended) ("ERISA") 29 U.S.C. §§1001, et seq., 29 U.S.C. §1132." Judge Lamberth's Memorandum Opinion, CA No. 88-2272, November 15, 1988 p. 2. In his Opinion, Judge Lamberth found that "jurisdiction is not exclusive, and is at most concurrent . . ." id. at p.11. As a result, J. Lamberth granted Danielle Clark's Motion to Dismiss and denied Raymond Clark's Motion for a Preliminary injunction as moot.[1] On December 5, 1989, Judge Goodrich held a motions hearing on all pending matters in this case. The Court will discuss each motion separately.

II. CONCLUSION OF LAW

A. Defendant's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment

Defendant moves for Summary Judgment on the grounds that plaintiff's Complaint for Specific Performance is expressly based upon provision 4 in their separation agreement, which is allegedly void and unenforceable under 29 U.S.C. §1056(d)(3)(A) because plaintiff failed to obtain a qualified domestic relations order as required by ERISA. In opposition, plaintiff contends that the Agreement is a contract governed by D.C. contract law and not by federal law, i.e. ERISA. Plaintiff argues that the essential fact here is that the funds to be transferred pursuant to the agreement were not to be transferred by a trustee of a retirement fund or any third party, but rather it was to be a transfer of an interest of monies when received by the defendant, therefore making ERISA wholly inapplicable. When considering a request for summary judgment, the Court must consider the evidence in the light most favorable to the non-moving party[2] and determine (1) whether any genuine issue of material fact exists and (2) whether plaintiff or defendant is

[1] Defendant's action in District Court is now pending an appeal.

[2] Here, the Court must carefully consider the positions set forth by both sides since there are cross-motions for summary judgment.

entitled to judgment as a matter of law. Taylor v. Eureka Investment Corp., 482 A.2d 354,357 (D.C. 1984); Holland v. Haman, 456 A.2d 807,814 (D.C. 1983); See Super. Ct. Civ. R. 56 (c) (1987).

(1) Whether there are any genuine issues of material fact.

Both parties acknowledge that their Agreement is a valid contract. Defendant only disputes the validity of paragraph 4, which is a matter of law. Thus, the Court finds that there are no material facts in dispute and considers the second prong for a determination of summary judgment.

(2) Whether plaintiff or defendant is entitled to judgment as a matter of law.

> In his Memorandum Opinion, J. Lamberth reasoned that The holder of the qualified order becomes a participant or beneficiary who seeks to recover benefits due under the plan. Such enforcement actions remain under §502(a) (1) (B) , and are thus properly brought in state court, unless the action is properly removed, to determine whether Danielle Clark is such a beneficiary, and if so, whether her claim is preempted and thus void for failure to obtain the qualified Order before the termination of the plan in 1986.

Judge Lamberth's Memorandum Opinion, CA No. 88 2277, Nov. 15, 1988 pp. 10-11. Since this action has not been removed to the District Court, this Court must, as Judge Lamberth explained, first determine whether the plaintiff is a "beneficiary" of the defendant's Keogh Plan.

It is the view of this Court that although plaintiff was promised a portion of certain payments from the defendant's Keogh Plan, plaintiff was never made a beneficiary of that Plan, i.e. no arrangements were ever made to make plaintiff a direct recipient of the benefits from the pension plan. Defendant was the only person ever designated to receive funds from the pension plan and as a result, plaintiff never became an assignee or beneficiary of 6 - defendant's Keogh Plan as the term is used in 29 U.S.C. §1056 (d) (3).

Basically, paragraph 4 acknowledges that the payments made .into the Keogh Plan were "the joint property of the Parties . - -" and provide that "[a]t such time as Husband elects to receive benefits under this plan, such benefits when received by .Husband shall be divided equally between the parties . . ."

The Agreement p. 6 para. 4 (emphasis added). Rather than involving plaintiff in the Keogh Plan as a beneficiary, paragraph 4 merely determines when and how much plaintiff is to be paid -- that plaintiff is to be laid when "such benefits [are] received by Husband" and that the benefits "shall be divided equally." Here, the Keogh Plan is involved only to establish a time and amount that plaintiff should be paid for this jointly held property. Thus, the Court finds that ERISA does not apply and that this case should be decided by applying the principles of contract law in this jurisdiction. See Spencer v. Spencer, 949 A.2d 1279, 1285 (D.C. 1985).

In accordance with the principles of contract law, the disputed paragraph 4 had two conditions precedent that had to be satisfied before plaintiff could receive payment -- that "Husband elects to receive benefits" and that he receive the benefits. Both of which were satisfied on November 6, 1986 when defendant received the lump sum amount of $279,637.56. Upon his receipt of that amount, one-half of this sum became due and owing to plaintiff pursuant to their Agreement.

There is no dispute over the contract itself, therefore, the Court finds that defendant is in breach of the Agreement. Accordingly, the Court denies the defendant's Motion for Summary Judgment and grants the plaintiff's Cross Motion for Summary Judgment.

B. Plaintiff's Motion for leave to Join an Additional Necessary Party; Plaintiff's Motion for Temporary Restraining Order; and Plaintiff's Motion to Compel

As a result of the Court's decision above, these motions are hereby denied as moot subject to the defendant's compliance with the following Judgment.

JUDGMENT

Wherefore, it is by the Court this 14th day of December 1989

ORDERED THAT:

1. The defendant, J. Raymond Clark, pay the plaintiff, Danielle J. Clark, the amount of one hundred thirty nine thousand eight hundred nineteen and xx/100 dollars ($139,819.00), which is one-half of the lump-sum he received from his Keogh Plan as mentioned in paragraph 4 of the Agreement.
2. The defendant pay plaintiff reasonable attorney's fees, costs and expenses incurred as a result of his breach of the Agreement

as specified on p.26 para. 21 of the Agreement.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

Copies to:

Brian West, Esquire
1333 H. Street, N.W.
Suite 660
Washington, D. C. 20005

J. Raymond Clark
Anne Lewis Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522

Lutz A. Prager, Esquire
Assistant Corporation Counsel

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK
Plaintiff,

v. CASE NO. D 2976-86

RAYMOND CLARK
Defendant.

ORDER

This matter comes before the Court by virtue of the defendant's Motion for Reconsideration and Clarification Amendment of Order and Judgment received on January 2, 1990 and the plaintiff's Opposition thereto received on January 18, 1990. The Order from which this motion stems was signed and filed by this Court on December 15, 1989. In this Order, the Court denied the defendant's Motion for Summary Judgment and granted plaintiff's Cross-Motion for Summary Judgment. In addition, the Court directed the defendant to pay the plaintiff $139,819.00 as well as reasonable attorney's fees, costs and expenses.

Defendant now asks the Court to reconsider, clarify, and amend its December 15th Order. It is clear from defendant's motion that he continues to apply the Employees Retirement Income Security Act of 1974 [ERISA] to this case. On page 6 of the December 15th Order, this Court explicitly stated that, "ERISA does not apply and that this case should be decided by applying the principles of contract law in this jurisdiction." Defendant purposely misconstrues the December 15th Order by applying ERISA to the Court's words where the Court is strictly speaking in terms of contract law. Defendant's failure to apply contract law rather than ERISA to this case and the December 15th Order naturally leads to a variety of questions. Nevertheless, the defendant insists upon framing his questions in terms of ERISA problems which do not exist.

The December 15th Order clearly explains the Court's interpretation of the disputed paragraph 4 of the separation

agreement. The Court found that the parties entered into an agreement where the defendant was to pay the plaintiff a certain sum of money. The amount was to be one-half the amount defendant received from his Keogh plan and the amount was to become due and owing upon the defendant's election to receive benefits from his plan.

Since both conditions, that defendant elect to receive benefits and that he receive the benefits, have occurred, one-half the sum received by the defendant is now owed to plaintiff pursuant to the Agreement. Defendant received $279,637.56 on November 6, 1986, at that time, $139,819.00 became due and owing to plaintiff.

If defendant is concerned about labeling this amount as alimony for tax purposes, he may do so and claim his deduction with plaintiff reporting this amount as income. Regardless of what this sum of money is ultimately labeled, alimony or otherwise, defendant owes plaintiff $139,819.00.

Defendant's motion raises a question regarding Putnam Growth Stock, however, nothing concerning Putnam Growth Stock has been presented to the Court so the Court has made no decisions regarding any benefits that may or may not have been received therefrom. Therefore, the Court does not see any problem with its interpretation of the word "benefits" as it is used in paragraph 4.

Defendant also misconstrues Judge Lamberth's opinion of the District Court. Judge Lamberth never acknowledged that the plaintiff is a "beneficiary" under ERISA. He merely made an assumption for a hypothetical he was setting forth.

As for defendant's denial that he never received any benefits, the Court points out that the evidence shows that he received $279,637.56 from his Keogh Plan. Unless defendant can rebut that evidence, the Court continues to hold that it is sufficient to prove that he did receive benefits in that amount.

Finally, the Court has reviewed the motions which were denied as moot subject to the defendant's compliance with this Court's Judgment. Since it appears that the defendant's compliance with the Judgment may require more effort on the part of the plaintiff and for the reasons set forth in plaintiff's motions, the Court now reinstates plaintiff's Motion for Leave to Join an Additional Necessary Party and plaintiff's Motion to Compel for a ruling by this Court.

Therefore, it is this 29th day of January 1990

ORDERED that defendant's Motion for Reconsideration

and Clarification and Amendment of Order and Judgment be and hereby is denied. The Court hereby affirms its Order of December 15th and directs defendant J. Raymond Clark to comply with that Order, making payment to plaintiff Danielle J. Clark within sixty (60) days of the date of this Order, and it is

FURTHER ORDERED that the plaintiff's Motion for Leave to Join an Additional Necessary Party be and hereby is granted and the defendant's present wife, Anne L. Clark, is hereby joined as a necessary party defendant, and it is

FURTHER ORDERED that the plaintiff's Motion to Compel be and hereby is granted, and the defendant is directed to answer plaintiff's questions within sixty (60) days from the date of this Order and it is

FURTHER ORDERED that plaintiff's Motion for a Temporary Restraining Order be and hereby is denied as moot since this Court has already rendered a final judgment regarding this matter.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

Copies to:

Brian West, Esquire
1333 H. Street, N.W., Suite 600
Washington, D.C. 20005

J. Raymond Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522

Lutz A. Prager, Esquire
Assistant Corp. Counsel

APPENDIX IIE

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK
Plaintiff,

v.

RAYMOND CLARK
Defendant.

ORDER

This matter comes before the Court by Virtue of the Defendant's Motion to Strike Plaintiff's Opposition to Motion for Reconsideration and Clarification and Amendment of Order and Judgment and Plaintiff's Motion to Grant Previously Filed Motion to Add Third Party Defendant and Other Relief received on February 1, 1990 and the Plaintiff's Reply thereto filed on February 13, 1990, Plaintiff's Motion and Affidavit in Support of Request for Attorney's Fees filed on February 23, 1990, Defendant's Opposition thereto received on March 5, 1990, and Plaintiff's Reply thereto filed on March 12, 1990; Defendant's Motion for Relief From Judgment and Orders, For Stay of Proceedings to Enforce Judgment and For Stay Pending Appeal received on February 23, 1990 and Plaintiff's Opposition thereto filed on March 8, 1990; Defendant's Motion to Strike Defamatory Allegations in Plaintiff's Motion for Summary Judgment received on March 23, 1990, Plaintiff's Opposition thereto, and Defendant's Reply thereto received on April 10, 1990.

On December 15, 1989, this Court filed an Order denying the defendant's Motion for Summary Judgment, granting the plaintiff's Cross Motion for Summary Judgment and directing defendant to pay plaintiff the amount of $139,819.00 as well as reasonable attorney's fees, costs and expenses incurred as a result of his breach of the Separation Agreement. In this Order, plaintiff's Motion for Leave to Join an Additional Necessary Party, plaintiff's Motion for Temporary Restraining Order, and plaintiff's Motion to Compel were all denied as moot subject to

the defendant's compliance with the Court's ruling.

Defendant subsequently filed a Motion for Reconsideration and Clarification and Amendment of Order and the plaintiff filed an Opposition thereto. On January 30, 1990, this Court filed an Order denying defendant's motion and directing defendant to comply with this Court's December 15th Order within sixty days of the date of the January 30th Order. In addition the Court ruled on plaintiff's motions previously denied as moot -- plaintiff's Motion for Leave to Join an Additional Necessary Party was granted and defendant's wife Anne L. Clark was joined as a necessary party defendant; plaintiff's Motion to Compel was also granted and defendant was directed to answer plaintiff's questions within sixty days from the date of the January 30th Order; and plaintiff's Motion for a Temporary Restraining Order was denied as moot since this Court had already entered a final judgment in this case.

Numerous motions have been filed regarding the rulings described above. The Court will discuss each motion separately.

Motion of Defendant to Strike Plaintiff's Opposition to Motion for Reconsideration and Clarification and Amendment of Order and Judgment and Plaintiff's Motion to Grant Previously Filed Motion to Add Third Party Defendant and Other Relief

Defendant seeks to have plaintiff's opposition stricken because it was not timely served, it supplements pleadings previously argued before the Court, and it misstates the dates of service of the pleadings upon the defendant. In opposition, plaintiff denies each of defendant's allegations and argues that defendant's motion was meant only to harass plaintiff and increase her legal costs. In addition, plaintiff asserts that defendant's motion was rendered moot by this Court's denial of his Motion for Reconsideration.

Upon review of these pleadings, the Court hereby accepts plaintiff's opposition as timely filed, affirms its Order of January 30th, and therefore denies defendant's Motion to Strike Plaintiff's Opposition as moot.

Motion of Defendant For Relief From Judgment and Orders, For Stay of Proceedings to Enforce Judgment and For Stay Pending Appeal

On March 1, 1990, defendant filed a Notice of Appeal for review of this Court's December 15th Order and now seeks a stay

of this Court's Judgment and Orders pending this appeal. In opposition, plaintiff argues that defendant has failed to come forth with a supersedeas bond as required by Super. Ct. Dom. Rel. Rule 62(b) and 62-I.

Upon review of these pleadings, the Court does not see any reason why defendant's motion should not be granted, but does feel that a supersedeas bond should be posted by the defendant to ensure the availability of the Judgment awarded to plaintiff should she prevail on appeal. Rule 62-I states that

> the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay . . .

Accordingly, the Court hereby directs defendant to file a supersedeas bond in the amount of one hundred forty thousand and XX/100 dollars ($140 000 00)[1] plus fifteen percent (15%) of that amount to cover costs, interest, and possible damages for delay.[2] Thus, defendant's request for a stay of this Court's Judgment is granted subject to his posting a supersedeas bond in the amount of one hundred sixty one thousand and XX/100 dollars ($161,000.00).

Motion of Anne L. Clark For Reconsideration and Amendment of Order

Anne L. Clark seeks a reconsideration and an amendment of this Court's January 30th Order joining her in this action as a necessary party defendant. In support of her motion, Anne Clark argues that she lives more than 650 miles from the District of Columbia and that this Court has no jurisdiction over her. In opposition, plaintiff contends that the Court does have jurisdiction over Anne Clark because the subject matter of this litigation - - the pension benefits - - are allegedly held in a joint bank account in her name along with defendant Raymond Clark.

Whether or not the Court does have jurisdiction over Anne Clark, the Court certainly has jurisdiction over the pension benefits received by the defendant and this Court's concern is that those benefits or at least the equivalent amount

---

[1] The amount of the judgment in the December 15th Order is 139,819.00.

[2] This amount may be adjusted at the conclusion of the appeal should plaintiff be successful. Such adjustments may include greater expenses than anticipated by the 15% or may return money to defendant for over anticipated expenses.

of those benefits owed to plaintiff are produced. Inasmuch as defendant is required to produce those benefits or their equivalent in the form of a supersedeas bond, the Court finds that Anne L. Clark may not be 'needed in plaintiff's attempts to secure the benefits to which she is entitled. Accordingly, Anne L. Clark's motion is hereby granted subject to defendant's production of a supersedeas bond in the full amount.

Plaintiff's Motion and Affidavit in Support of Request for Attorney's Fees

Plaintiff seeks $37,000.00 for attorney's fees and costs incurred since the institution of this suit in May of 1986. Plaintiff adds that her fees and costs were unnecessarily increased by defendant's harassing actions. In opposition, defendant contends that the fees and costs sought by plaintiff include fees for services rendered to plaintiff for other matters unrelated to this case.

Although reasonable attorney's fees have already been granted to plaintiff in the Court's December 15th Order, plaintiff's motion and affidavit in request of fees is now somewhat premature with the stay of this Court's Judgment pending the defendant's appeal. As a result, this Court will deny this motion as premature and allow plaintiff to renew her request upon an appellate ruling in her favor.

Pro Se Defendant's Motion to Strike Defamatory Allegations in Plaintiff's Motion for Summary Judgment

Defendant asks this Court to strike paragraph 4 of plaintiff's Motion for Summary Judgment claiming that there is no evidence to support plaintiff's allegations that defendant has secreted the monies received from his pension plan in a joint account with Anne Clark. In opposition, plaintiff stands by the truthfulness of her allegations that defendant has acted in concert with Anne Clark to adversely affect and impact plaintiff's property interests.

This Court has already ruled above that Mr. Clark should post a supersedeas bond which includes the full amount of this Court's Judgment. As stated above, the posting of this bond will eliminate any need for Anne Clark. As a result, defendant's fears regarding plaintiff's allegations are essentially a moot issue. Accordingly, defendant's Motion to Strike is hereby denied as moot.

SO ORDERED on this 27th day of April 1990.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

Copies to:

J. Raymond Clark
Anne Lewis Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522

Brian West, Esquire
8000 Tavers Crescent Drive
Suite 660
Vienna, Virginia 22182

Lutz A. Prager, Esquire
Assistant Corporation Counsel

APPENDIX IIF

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK
Plaintiff,

v.

RAYMOND CLARK
Defendant.

ORDER

This matter comes before the Court by virtue of the plaintiff's Motion for Contempt filed on July 10, 1990, the defendant's Opposition thereto received in chambers on July 18, 1990, and the plaintiff's Supplemental Memorandum in Support of Motion for Contempt filed on September 6, 1990.

Judge Goodrich signed an Order on January 29, 1990 (filed on January 30, 1990) directing defendant to answer plaintiff's deposition questions. Then on April 27, 1990, Judge Goodrich signed another Order (filed on April 30, 1990) granting defendant's Motion for a Stay of the January Order subject to the defendant's posting of a supersedeas bond in the amount of $161,000.00. Plaintiff now contends that defendant has failed to post a supersedeas bond and that the Court's January 29th Order therefore remains enforceable.

Upon consideration of plaintiff's request that defendant be held in contempt, the Court hereby directs all parties to appear before this Court on October 15, 1990 at 9:30 a.m. At that time defendant shall show cause why he should not be held in contempt for his failure to either post a supersedeas bond or answer plaintiff's deposition questions as required by this court.

SO ORDERED on this 10th day of September 1990.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

Copies to:

J. Raymond Clark
Anne Lewis Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522

Brian West, Esquire
8000 Tavers Crescent Drive
Suite 660
Vienna, Virginia 22182

Lutz A. Prager, Esquire
Assistant Corporation Counsel

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK
Plaintiff,

v.

RAYMOND CLARK
Defendant.

ORDER

This matter comes before the Court by virtue of Defendant's letter of September 20, 1990 which the Court treats as an informal Motion to Reconsider the Court's order dated September 11, 1990, requiring the defendant to appear to show cause why he should not be held in contempt for failing to post a supersedeas bond and for failing to respond to certain discovery requests.

The parties were divorced by this Court on February 27, 1979. Prior to their divorce, the parties executed a written Separation and Property Settlement Agreement [hereinafter, "Agreement"] signed on March 1, 1976. The Agreement provided that Plaintiff receive 1/2 of Defendant's retirement benefits when Defendant elected to receive them. In November 1986, the Defendant received his retirement benefits in a lump sum payment of $279,637.56. Thereafter, Plaintiff filed an action in this Court seeking specific performance of the Agreement as well as damages.

On December 15, 1989 this Court granted Plaintiff's Cross Motion for Summary Judgment and ordered Defendant to pay Plaintiff one hundred and thirty nine thousand, eight hundred nineteen dollars ($139,819.00), which amounted to one half of the retirement benefits received by Defendant. In its order, the Court ruled on several additional motions filed by the parties. Specifically, the Court denied as moot Plaintiff's Motion to Join and Additional Necessary Party, Plaintiff's Motion for a Temporary Restraining Order, and Plaintiff's Motion to Compel. The Court specified, however, that the motions were denied

subject to Defendant's compliance with the judgment.

Thereafter, Defendant filed a Motion for Reconsideration and Clarification and Amendment of the Order and the Plaintiff filed and Opposition thereto. On February 1, 1990, this Court filed an order denying Defendant's motion to reconsider the December 15, 1989 ruling. At this time, since the defendant had not satisfied the judgment, the Court reconsidered Plaintiff's motions which were previously denied as moot and granted her Motions to Join an Additional Necessary Part and to Compel the Defendant to respond to discovery requests.[1] Thereafter, Defendant appealed the Court's decisions to the Court of Appeals for the District of Columbia. Defendant also moved this Court to stay the judgment pending appeal. On April 30, 1990 this Court granted Defendant's request to stay the judgment on the express condition that Defendant post a supersedeas the bond in the amount of one hundred and sixty one thousand dollars and XX/100 ($161,000.00) as required by Super. Ct. Dom. Rel. Rule 62 and 62-I.

Plaintiff has filed a Motion for Contempt on the grounds that Defendant has neither satisfied the judgment nor posted the bond and further, that Defendant has not complied with the Court's order compelling him to provide discovery regarding Defendant's use of the retirement funds. Defendant filed an Opposition to Plaintiff's Motion on the grounds that the discovery issue is moot because the case is on appeal. On August 7, 1990 Judge Mitchell ordered the parties to appear before the Court on August 29, 1990 for a hearing on Plaintiff's Motion for Contempt and Defendant's opposition thereto. Defendant failed to appear at this hearing.
Thereafter, the Court entered its show cause order setting the hearing on these same motions for October 15, 1990.

Defendant's informal motion to reconsider this show cause order merely reiterates the position he took in his Opposition to Plaintiff's Motion to Compel that the discovery issues are moot. As to the Court's order that Defendant show cause why he has not posted a supersedeas bond, Defendant argues that this issue is not properly before the Court. To support his contention, Defendant states that Plaintiff has failed

[1] In her Motion to Join a Necessary Party Plaintiff contended that since the defendant had deposited a portion of the retirement funds into a joint account with his current wife, Anne Lewis Clark, in order to protect Plaintiff's interest it was necessary to join Anne Lewis Clark in the action. In her Motion to Compel, Plaintiff alleged that Defendant had likewise invested a portion of the funds in various financial ventures in an effort to hide them from Plaintiff.

to properly plead this issue and moreover, that this Court is without authority to find Defendant in Contempt for failing to post the bond.

Rule 62 of the Superior Court Rules for Domestic Relations Proceedings is identical to Superior Court Rule 62[2] which provides for a stay of proceedings pending appeal. The rule states in pertinent part:

> (d) Stay pending appeal When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this Rule. The bond may be given at or after the time of filing the Notice of Appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Super. Ct. Rule 62(d) (emphasis added) On April 30, 1990 this Court granted Defendant's request for a stay of the judgment on the express condition that Defendant post a supersedeas the bond in the amount of one hundred and sixty one thousand dollars and XX/100 ($161,000.00) as required by Super. Ct. Dom. Rel. Rule 62 and 62-I. Defendant suggests that pursuant to Super. Ct. Rule 62-II, Plaintiff's only avenue for relief is to move the Court to lift the stay. The rule also requires use of certain forms which the Plaintiff did not use.

After carefully reviewing the rules, the Court finds that although Defendant may correctly assess the Super. Ct. Rule 62-II, because Defendant never actually posted the requisite bond, the Court's stay was never effective in the first place. See Super. Ct. Rule 62(d). Therefore, since the Defendant has likewise failed to satisfy the judgment in this matter, the Court finds that Plaintiff has in fact pursued the proper avenue for relief by filing a Motion for Contempt.

As to the issue of discovery, the Court rejects Defendant's argument for two reasons. While it is true that this Court would lack jurisdiction to hear substantive issues appealed, here discovery is sought solely for the purposes of protecting Plaintiff's interest in the judgment. Since the funds which are the subject of this litigation have been deposited into various accounts and have otherwise been invested in various financial ventures, it has become necessary for Plaintiff to piece together the location of the funds are in order to pursue measures

[2] See Super. Ct. Dom. Rel. Rule 62, comment.

necessary to enforce the Court's Judgment.

Moreover, Defendant has failed to convince this Court that he in fact appealed the discovery issues. Although Defendant's docketing statement reflects that he appeals from various order entered by this Court, in his Motion to Stay Execution of the Judgment filed with the Court of Appeals on July 18, 1990, Defendant merely argues that this Court erred in granting Plaintiff's Cross Motion for Summary Judgment. He at no time moved the Court of Appeals to relieve him of this Court's order to provide discovery. Furthermore, the Court of Appeals denied Defendant's Motion on August 28, 1990.

Finally, in his informal motion Defendant states that he is both physically and financially unable to travel to Washington, D.C. to attend the hearing scheduled for October 15, 1990. Defendant has provided no medical proof whatsoever to support his contention that he is physically unable to travel. As to the costs involved, considering the fact that the judgment in this matter is in excess of $139,000.00 and that Defendant has neither satisfied it nor posted the requisite bond, the Court finds Defendant's contention without merit.

Therefore, upon consideration of Defendant's informal request to reconsider this Court's show cause order, the Court finds that Defendant Raymond Clark must appear on October 15, 1990 to show cause why he should not be held in contempt.

SO ORDERED on this 4th day of October, 1990.

Judge George Herbert Goodrich
Signed in Chambers

Copies to:

J. Raymond Clark
Anne Lewis Clark
157 St. Andrews Drive
St. Simons Island, Georgia 31522

Brian West, Esquire
8000 Tavers Crescent Drive
Suite 660
Vienna, Virginia 22182

Lutz A. Prager, Esquire
Assistant Corporation Counsel

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS BRANCH

DANIELLE J, CLARK
Plaintiff,

v. CASE NO,D2976-86

J. RAYMOND CLARK,
Defendant.

ORDER

This matter comes before the Court by virtue of a phone call received in the chambers of Judge Goodrich on October 15, 1990 from the defendant, Defendant stated that he could not attend the show cause hearing which was scheduled October 15, 1990.

On September 10, 1990 Judge Goodrich entered an Order requiring Defendant to appear to show cause why he should not be held in contempt for, inter alia, failing to post a supersedeas bond pending appeal of this matter. On September 22, 1990, Judge Goodrich received a letter from Defendant requesting reconsideration of the Court's September 10, 1990 Order. On October 5, 1990, treating the letter as an informal Motion to Reconsider, Judge Goodrich denied Defendant's request. Defendant contends that he did not receive the order until October 13, 1990, two days prior to the scheduled hearing.

Therefore, it is this 15th day of October, 1990;

ORDERED:

That the show cause hearing is continued to November 2, 1990, and the Defendant is directed to be present unless he can provide the Court with proof of at least one of the following:

(1) That he has satisfied the judgment herein;
(2) That he has posted the requisite supersedeas bond;
(3) That he provide medical proof that he is unfit to travel;
(4) For some other satisfactory reason he is unable to attend the hearing.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

Copies to:

J. Raymond Clark
Anne Lewis Clark
157 St. Andrews Drive
St. Simons Island, GA 31522

Brian West, Esquire
8000 Tavers Crescent Drive
Suite 660
Vienna, VA 22182

Lutz A. Praeger, Esquire
Assistant Corporation Counsel

Appendix II-I

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS

DANIELLE J. CLARK,
Plaintiff,

v. CASE NO. D 2976-86

J. RAYMOND CLARK,
Defendant.

ORDER

This matter comes before the Court by virtue of a letter received in the chambers of Judge Goodrich on October 22, 1990, from the Defendant which the Court treats as an informal motion to vacate the Show Cause Orders entered on September 10, 1990 and October 15, 1990. The hearing was originally scheduled for October 15, 1990, however, because Defendant failed to appear on that date the hearing was continued to November 2, 1990.

On October 15, 1990, this Court entered an order directing Defendant to appear on November 2, 1990 unless he could provide the Court with proof of at least one of the following:

(1) That he has satisfied the judgment herein;
(2) That he has posted the requisite supersedeas bond;
(3) That he provide medical proof that he is unfit to travel;
(4) For some other satisfactory reason he is unable to attend the hearing.

Defendant states that he is "de facto bankrupt" and accordingly he is financially unable to satisfy the judgment, post the bond or travel to Washington for a hearing in this matter. Defendant has failed, however, to provide the Court with any proof whatsoever to substantiate this contention. Likewise, Defendant has failed to provide the Court with any medical proof from a physician to substantiate his claim that he is physically unfit to travel.

Based upon the foregoing, it is this 26th day of October,

1990, **ORDERED**:

That the Defendant is directed to appear before the Court on November 2, 1990 to show cause why he should not be held in contempt.

It is further **ORDERED**:

That the stay of judgment in this matter is hereby **VACATED**.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

copies to:

J. Raymond Clark
Anne Lewis Clark
157 St. Andrews Drive
St. Simons Island, GA 31522

Brian West, Esquire
8000 Tavers Crescent Drive
Suite 660
Vienna, VA 22182

Lutz A. Praeger, Esquire
Assistant Corporation Counsel

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

FAMILY DIVISION

DANIELLE J. CLARK
Plaintiff

v. Case No. D 2976-86

J. RAYMOND CLARK
Defendant

ORDER

This matter comes before the Court by virtue of a Show Cause hearing scheduled in this matter for November 2, 1990 at which Defendant failed to appear. This was the third such hearing in this matter at which Defendant has failed to appear.

Background

The parties were divorced by this Court on February 27, 1979. Prior to their divorce, the parties executed a written Separation and Property Settlement Agreement [hereinafter, Agreement] signed on March 1, 1976. The Agreement provided that Plaintiff would receive 1/2 of Defendant's retirement benefits when Defendant elected to receive them. In November 1986, the Defendant received these benefits in a lump sum payment of $279,637.56. Thereafter, Plaintiff filed an action in this Court seeking specific performance of the Agreement as well as damages.

On December 15, 1989 this Court granted Plaintiff's Cross Motion for Summary Judgment and ordered the defendant to pay to Plaintiff one hundred and thirty nine thousand, eight hundred nineteen dollars ($139,819.00), which amounted to one half of the retirement benefits received by Defendant.

In its December 15, 1989 Order, the Court denied as moot several pending Motions including Plaintiff's Motion to Join an Additional Necessary Party, Plaintiff's Motion for a Temporary Restraining Order, and Plaintiff's Motion to Compel Discovery. The Court specified, however, that the motions were denied subject to Defendant's compliance with the judgment.

Defendant did not satisfy the Judgment. On February 1,

1990, this Court issued an order wherein it denied a motion filed by Defendant to reconsider the December 15, 1989 ruling. Additionally, since the defendant had not satisfied the judgment, the Court reconsidered Plaintiff's motions which were previously denied as moot and granted her motion to join an Additional Necessary Party and to Compel the Defendant to response to discovery requests.[1] Thereafter, Defendant appealed the Court's decisions to the Court of Appeals for the District of Columbia.

Defendant also moved this Court to stay the judgment pending appeal. On April 30, 1990 this Court granted Defendant's request to stay the judgment on the express condition that Defendant post a supersedeas the bond in the amount of one hundred and sixty one thousand dollars and XX/100 ($161,000.00) as required by Super. Ct. Dom. Rel. Rule 62 and 62-I.

Thereafter, Plaintiff filed a Motion for Contempt on the grounds that Defendant neither satisfied the judgment nor posted the bond and further, that Defendant has not complied with the Court's order compelling him to provide discovery regarding Defendant's use of the retirement funds. Defendant objects to Plaintiff's motion on the grounds that the discovery issue is moot because the case is on appeal.

On August 7, 1990, Judge Mitchell ordered the parties to appear before the Court on August 29, 1990 for a hearing on Plaintiff's Motion for Contempt and Defendant's opposition thereto. Defendant did not appear at this hearing. On September 11, 1990, the Court entered a show cause order setting the hearing on these same motions for October 15, 1990.

On September 22, 1990, the Chambers of Judge Goodrich received a letter from the Defendant which the Court treated as an informal Motion to Reconsider the Order entered on September 11, 1990. Upon consideration of Defendant's request, Judge Goodrich entered an Order on October 5, 1990, directing the Defendant to appear on October 15th as earlier ordered.

On October 15, 1990, the date of the show cause hearing, the Chambers of Judge Goodrich received a phone call from the

---

[1] **In her Motion to Join a Necessary Party Plaintiff contended that since the defendant had deposited a portion of the retirement funds into a joint account with his current wife, Anne Lewis Clark, in order to protect Plaintiff's interest it was necessary to join Anne Lewis Clark in the action. In her Motion to Compel Discovery, Plaintiff alleged that Defendant had likewise invested a portion of the funds in various financial ventures in an effort to hide them from Plaintiff.**

Defendant. Defendant stated that he did not receive the Court's October 5th order until October 13th and that he was unable to attend. Defendant requested to speak to Judge Goodrich personally, however, the judge's law clerk took the call. At that time Defendant was directed to provide the Court with proof of one of the following:

(1) that he has satisfied the judgment herein;
(2) that he has posted a supersedeas bond;
(3) medical proof that he is unfit to travel to Washington for the hearing;
(4) some other sufficient reason which would satisfy the Court that the Show Cause hearing should be vacated.

On October 15, 1990, Judge Goodrich entered another Order wherein he continued the hearing to November 2, 1990. The Defendant was again directed to appear unless he could provide the Court with the evidence listed above. It should be noted that on August 28, 1990 the Court of Appeals denied Defendant's motion to stay execution of the judgment. Further, since Defendant had not posted the requisite bond, on October 15, 1990, the Court vacated the stay.

On October 26, 1990, Judge Goodrich again received a letter from the Defendant wherein he made a variety of statements to support his contention that he is unable to travel to Washington for the hearing in this matter. Specifically, Defendant contends that he can not afford to travel to Washington from his home in Georgia. He also contends that he is physically unable to make the trip. Defendant did not, however, provide the Court with any proof whatsoever of his contentions.

In response to Defendant's letter, Counsel for the Plaintiff, Brian D. West, likewise wrote a letter to Judge Goodrich stating that it was his belief that Defendant had not substantiated his contentions to warrant the Court vacating the show cause order. The Court did not respond to Defendant's October 26th letter.

On November 1, 1990, the Chambers of Judge Goodrich received, via express mail, an affidavit from the Defendant wherein he alleges that Judge Goodrich is personally biased against him. Defendant also contends that Judge Goodrich and counsel for the Plaintiff have engaged in ex parte communications in this matter. He bases his claim on a statement made by Mr. West in his letter to Judge Goodrich

wherein Mr. West wrote, "If I might be of further assistance, please do not hesitate to contact me."

The Court finds Defendant's allegations entirely without merit. To be sure, Mr. West carbon copied his letter to the Defendant. Moreover, if Defendant is going to allege ex parte communications he should closely examine his own behavior in this matter. As noted above, on October 15, 1990, Defendant called Chambers and asked to speak with Judge Goodrich personally. Further, although Defendant has sent copies to counsel for Plaintiff, he has made a habit of writing letters to Judge Goodrich rather than filing formal motions.

As to his allegations of personal bias or prejudice, the Court likewise finds them without merit. The Court has gone out of its way to permit the Defendant to provide some evidence that would support the Court vacating the show cause order yet all the Defendant has provided are bare statements that he can not afford to travel and that he is physically unable to do Absent these allegations, Defendant has provided no proof whatsoever to reflect his financial position or physical condition. Defendant is a retired attorney who knows or should know that bare statements absent proof do not hold up in Court. Defendant even admits that his doctors have not provided him with a statement that he is physically unfit to travel. Similarly, Defendant has provided no evidence whatsoever of his financial situation other than his statement that he is "defacto" bankrupt.

The Court has specifically directed the Defendant on at least three occasions to provide the Court with proof of his allegations and he has failed to do so. The Court has also directed the Defendant to appear on three separate occasions and he has likewise failed to do so. Based upon the foregoing, the Court finds that it has no choice but to find the Defendant in contempt of Court.

WHEREFORE,
It is this 6th Day of November, 1990, **ORDERED**

(1) That Defendant is found to be in Contempt of Court;

(2) That Defendant can purge himself of this Contempt order by providing the Court with proof of one of the following:

(1) that he has satisfied the judgment herein;

(2) that he has posted a supersedeas bond;

(3) medical proof that he is unfit to travel to Washington for the hearing;

(4) some other sufficient reason which would satisfy the Court that the Show Cause hearing should be vacated.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

November 5, 1990

copies to:

J. Raymond Clark
Anne Lewis Clark
157 St. Andrew Drive
St. Simons Island, GA 31522

Brian West, Esquire
8000 Tavers Crescent Drive
Suite 660
Vienna, VA 22182

Lutz A. Praeger, Esquire
Assistant Corporation Counsel

Appendix II-K

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS BRANCH

DANIELLE J. CLARK,
Plaintiff,

v. CASE NO. D 2976-86

J. RAYMOND CLARK,
Defendant.

ORDER

This matter comes before the Court by virtue of Defendant's Motion for Reconsideration filed November 26, 1990; Plaintiff's Opposition thereto filed November 28, 1990 and Defendant's Reply filed on December 3, 1990. .

In his Motion for Reconsideration Defendant provided the Court with a signed affidavit in support of his contentions that he is "defacto bankrupt." Inasmuch as Defendant has provided no documentary evidence whatsoever to support his affidavit the Court is not satisfied that the contempt order entered on November 5, 1990 should be vacated.

WHEREFORE, it is this 20th day of December, 1990, **ORDERED**:
That the Defendant's Motion for Reconsideration is hereby **DENIED**.

JUDGE GEORGE HERBERT GOODRICH
Signed in Chambers

December 20, 1990

copies to:

J. Raymond Clark
Anne Lewis Clark
157 St. Andrew Drive
St. Simons Island, GA 31522

Brian West, Esquire
8000 Tavers Crescent Drive
Suite 660
Vienna, VA 22182

Lutz A. Praeger, Esquire
Assistant Corporation Counsel

Appendix II-L

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 89-7202

September Term, 1989
C.A. No. 88-02272

J. Raymond Clark,
Appellant

v.

Superior Court for the District of Columbia

BEFORE: Mikva, Buckley and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the courts' orders to show cause and the responses thereto, appellant's supplemental emergency motion for stay, the response thereto and the reply, and appellant's motion for remand, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the district court's order, filed November 14, 1988 be summarily affirmed. The Employees' Retirement Income Security Act (ERISA), 29 U.S.C. 1001, et seq. (1974), is inapplicable to the instant case because the funds at issue do not constitute benefits under the protection of an ERISA Plan. Hence, both the anti-alienation provision and general preemption clause of ERISA are inapplicable to this case. See 29 U.S.C. § 1056(d)(1); § 1141. Appellant received his benefits in a lump sum and therefore no longer "is or may be entitled to a benefit" under the Act. 29 U.S.C. § 1002(7). See Kunt v. Reese, 785 F.ed 1410, 1411 (9th Cir.), cert. denied, 479 U.S. 916 (1986). It is

FURTHER ORDERED that appellant's motion for remand and emergency motion for stay be dismissed as moot.

The Clerk is directed to withhold issuance of the

mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

District of Columbia
Court of Appeals

No. 90-FM-226

RAYMOND J. CLARK, ET AL.,

Appellants, D2976-86

v.

DANIELLE J. CLARK,

Appellee.

BEFORE: Rogers, Chief Judge; Ferren, Terry, *Steadman, *Schwelb, *Farrell, Wagner, King, and Sullivan, Associate Judges.

ORDER

On consideration of appellants' petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Copies to:

Honorable George Herbert Goodrich
Clerk, Superior Court

Mr. Raymond J. Clark
157 St. Andrews Drive
Saint Simons Island, GA 31522

Brian D. West, Esquire

8000 Towers Crescent Drive
Suite 660
Vienna, VA 22182

sl

District of Columbia
Court of Appeals

No. 90-FM-226

RAYMOND J. CLARK, ET AL.,
Appellants,

v. D2976-86

DANIELLE J- CLARK,
Appellee.

BEFORE: Steadman, Schwelb, and Farrell, and Associate Judges.

ORDER

On consideration of appellants' motion for stay of mandate, and appellee's motion to extend time to file opposition to motion, and the lodged opposition, it is

ORDERED that appellants' motion for stay of mandate is denied as moot and appellee's motion to extend time to file opposition to motion is denied.

PER CURIAM.

Copies to:

Raymond J. Clark, Esquire
157 St. Andrews Drive
Saint Simons Island, GA 31522

Brian D. West, Esquire
8000'Towers Crescent Drive
Suite 660
Vienna, VA 22182

kho

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment. or recognition,of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. pension plan shall provide for the payment of benefits in accordance with the applicable. requirements of any qualified domestic relations order.

(B) For purposes of this paragraph--

(i) the term "qualified domestic relations order" means a domestic relations order-

(I) which creates or recognizes the existence of an alternate payee's fight to, or assigns to an alternate payee the right to receive all or a portion of the benefits payable with respect to a participant under a plan, and

(1I) with respect to which the requirements "" subparagraphs

(C) and (D) are met, and (ii) the term "domestic relations order" ıneans any judgment. decree, or order (including approval of a property settlement agreement) which--

(1) relates to the provision of child support, alimony

payments, or marital property rights to a spouse, former spouse, child, other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subpart graph only if such order clearly specifies--

(i) the name and the last known mailing address (if any) of participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order--

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) In the case of any payment before a participant has-separated from service, a domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee-

(I) on or after the date on which the participant ,.trains (or would have attained) the earliest retirement age,

(il.) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 Percent

(ii) For purposes of this subparagraph, the term "earliest retirement age" has the meaning given such term by section 1055 (h)(3) of this title, except that in the case of any individual account plan, the earliest retirement age shall be the date which is 10 years before the normal retirement age.

(F) To the extent provided in any qualified domestic relations

order-

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title, and(ii) if married for at least 1 year, the former spouse shall be treated as meeting the requirements of section 1055(0 of this title.

(G)(i) In the case of any domestic relations order received by a plan--

(I) the plan administrator shall promptly notify the participant and any other alternate payee of the receipt of such order and the plan's Procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures. determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or other. wise), the plan administrator shall segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within 18 months the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons entitled thereto.

(iii) If within 18 months-

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period shall be applied prospectively only.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in-

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) In prescribing regulations under this paragraph, the Secretary shall with the Secretary of the Treasury.

(Pub. L. 93-406, Title 1. § 206, Sept. 2, 1974, 88 Star. 864; Pub. L. 98-397. Title 1, § 104(a), Aug. 23, 1984, 98 Star. 1433.)

§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought-

(l) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or-

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify
rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act practice which violates any provision of this subchapter or the terms the plan, or (B) to obtain other appropriate equitable relief (i) to redress the terms of the plan;

(4) by the Secretary, or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title.

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(e) Jurisdiction

(1) Except for actions under subsection (a)(l)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b)) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

PERTINENT REGULATIONS

26 Code of Federal Regulations §1,401(a)-13

Assignmentoralienation of benefits

(b) No assignment or alienation-(1) General Rule. Under 401 (a) (13), a trust will not be qualified unless the plan of which the

trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

(d) Exceptions to general rule prohibiting assignments or alienations(l) Certain voluntary and revocable assignments or alienations ....
For purposes of this subparagraph, an attachment, garnishment, levy, execution or other legal or equitable process is not considered a voluntary assignment or alienation.

26 CFR §1,401(a)-14 Commencement of benefits under qualified trusts .... (1) the attainment by the participant of age 65, or,if earlier, the normal age specified under the plan, ...